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OCTOBER TERM, 1990

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

v.

JOHNSON CONTROLS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF AMICI CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF THE RESPONDENT

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BRIEF AMICI CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF THE RESPONDENT

The Equal Employment Advisory Council (EEAC) and the National Association of Manufacturers of the United States of America (NAM) respectfully submit this brief amici curiae. Letters of consent on behalf of both parties have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.

INTEREST OF THE AMICI CURIAE

EEAC is a nationwide association of employers and trade associations organized in 1976 to promote sound approaches to the elimination of discriminatory employ-

ment practices. Its membership comprises a broad segment of the business community. The Council's governing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives the Council an unmatched depth of knowledge of the practical, as well as the legal, aspects of equal employment policies and requirements. The members of EEAC are committed firmly to the principles of nondiscrimination and equal employment opportunity.

NAM is a voluntary business association of over 13,000 companies and subsidiaries, employing eighty-five percent of all manufacturing workers, and producing over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council. NAM and these councils are vitally interested in workplace safety and health issues, as well as the proper interpretation of civil rights legislation.

The members of EEAC and NAM, and the constituents of their association members, are employers subject to various employment and labor laws, including Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* In addition, many of the EEAC and NAM member companies manufacture or process goods that involve chemicals or substances that have the potential to harm an unborn fetus. As a result, some companies have adopted fetal protection policies, much like the policy adopted by Johnson Controls in the instant case. Thus, EEAC and NAM have a direct interest in the issue presented for the Court's consideration herein, that is, whether Title VII permits an employer to have a fetal protection policy that excludes women of childbearing capacity (but not men) from jobs involving high levels of lead, when lead exposure poses a risk for a fetus, and when the qualified medical evidence shows that that risk is passed through women only.

Because of its interest in Title VII and the burden of establishing and defending a case of employment discrimination, EEAC has filed amicus briefs with this Court in a number of cases, including *Wards Cove Packing Co., Inc. v. Atonio*, 109 S. Ct. 2115 (1989); *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777 (1988); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). Similarly, EEAC filed briefs in *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983), and *Long v. State of Florida*, 108 S. Ct. 2354 (1988), cases involving the use of sex-based actuarial tables.

Moreover, because of its concern about the dangers of workplace hazards and the propriety of fetal protection policies, EEAC filed a brief in *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982), a case upholding an employer's fetal protection policy under circumstances similar to those presented herein. Similarly, NAM has been active in many civil rights and workplace safety cases before this Court, including *Asta v. Illinois*, 110 S.Ct. 52 (1989); *Manufacturers Association of Tri-County v. Knepper*, 484 U.S. 815 (1987); and *Local 28 of the Sheet Metal Workers' International Association v. EEOC*, 478 U.S. 421 (1986).

Thus, because of their significant experience, EEAC and NAM are uniquely situated to brief this court on the relevant concerns of the business community and, in accord with Supreme Court Rule 37, the importance of this case beyond that brought to this Court's attention by the parties.

STATEMENT OF THE CASE

In 1982, Johnson Controls implemented a policy excluding women capable of bearing children from working in jobs in the company's battery manufacturing plants, where the women would be exposed to high levels of lead. Although the company based its policy on medical evidence indicating that the risk to the fetus is passed through women only, the United Auto Workers (UAW) filed suit alleging that Johnson Controls' policy violated Title VII. The trial judge granted the company's motion for summary judgment, noting that Johnson Controls properly had justified its policy based on scientific evidence showing that there exists substantial risk of fetal harm through exposure to lead, that the risk is borne only by women and not by men, and that the company's fetal protection policy is effective in eliminating that risk of harm. Significantly, the UAW failed to present any evidence challenging the scientific basis for Johnson Controls' policy—or indicating that there was an acceptable alternative policy that would have a lesser discriminatory impact. Indeed, the UAW admitted that there was a substantial risk of harm to the fetus from lead exposure.

The Seventh Circuit upheld the district court's grant of summary judgment, holding that Johnson Controls' fetal protection policy was justifiable under either of two distinct Title VII theories of proof: the disparate impact/business necessity test, or the disparate treatment/bona fide occupational qualification (BFOQ) test. Significantly, in doing so, the court viewed as irrelevant whether Johnson Controls or the UAW maintained the burden of persuasion under these theories, since the company was entitled to summary judgment in any event.

Insofar as it applied a disparate impact/business necessity test, the Seventh Circuit followed the lead of the only other cases in the courts of appeals that had addressed fetal protection policies—*Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982), and *Hayes v. Shelby*

Memorial Hospital, 726 F.2d 1543 (11th Cir. 1984)—and indeed adopted the analytical framework that had been posited at the time by the Equal Employment Opportunity Commission. *See Policy Statement on Reproductive and Fetal Hazards Under Title VII*, Equal Employment Opportunity Commission, Fair Empl. Prac. Man. (BNA) 401:6613 (Oct. 3, 1988), *revised* Jan. 24, 1990. In doing so, the court followed *Wards Cove Packing Co., Inc. v. Atonio*, 109 S. Ct. 2115 (1989), in which this Court ruled that the plaintiff maintains the burden of persuasion throughout in a disparate impact/business necessity case.

Having determined that Johnson Controls' policy was valid under the business necessity test, the court further ruled that the company could avail itself of the BFOQ defense. The court reasoned that concern about industrial safety is a legitimate part of the essence of Johnson Controls' business operations. *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 896 (7th Cir. 1989). Because the risk of fetal harm is inherent in the normal operation of the company's business, its fetal protection plan is "reasonably necessary" to further the interest in industrial safety—and to exclude employees from that business operation on the basis of sex—since the risk of harm is "substantially confined" to women only. Therefore, according to the court, sex becomes a BFOQ for jobs in the manufacture of lead batteries, making Johnson Controls' fetal protection policy valid under Title VII. The dissenting judges argued that the BFOQ, not the business necessity, test should apply when analyzing fetal protection policies.

SUMMARY OF ARGUMENT

This Court has, over the years, recognized various theories under which plaintiffs can allege, and employers can defend, claims of Title VII discrimination. For purposes of examining Johnson Controls' fetal protection policy, however, it makes little difference which theory is used, since this Court recently clarified in *Wards Cove*, 109 S.Ct. 2115, that the plaintiff retains the burden of persuasion throughout the course of the litigation, and that, generally speaking, the employer has a burden merely of producing a business justification for its challenged policy. Indeed, the EEOC and the three courts of appeals that have considered fetal policies—the Fourth, Eleventh and the Seventh below—all have adopted similar analytical elements of proof.

A proper application of settled Title VII principles thus incorporates these common elements and focuses upon an employer's business justification for its policy—including the employer's concern for the safety of fetuses and other "third parties." *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977). Specifically, an employer may defend its policy by introducing evidence: 1) that there exists a substantial risk of fetal harm; 2) that, based on available evidence, the risk of transmitting such harm is substantially confined to employees of one sex; and 3) that its policy is reasonably necessary to the normal operation of its business—with due consideration of the safety interests of the fetus, the company and society. This standard, like Johnson Controls' policy itself, does not generalize against women but, rather encourages individualized determinations.

While an employer may defend by making this three-part showing, the plaintiff has the burden of persuasion throughout the case. *Wards Cove*, 109 S.Ct. at 2126. Thus, the plaintiff has the obligation to create an evidentiary record, to establish a *prima facie* case, to rebut the employer's showing, and to establish an equally effective, but less discriminatory alternative. Of course, as noted in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978), any alternative to the employer's chosen solution must be approached cautiously, since courts are "generally less competent than employers to restructure business practices." *See Wards Cove*, 109 S.Ct. at 2127.

ARGUMENT

I. REGARDLESS OF WHICH DISCRIMINATION THEORY A PLAINTIFF USES TO CHALLENGE A FETAL PROTECTION POLICY, TITLE VII PERMITS A COMPANY TO DEFEND ITS POLICY BY PRODUCING A LEGITIMATE BUSINESS JUSTIFICATION.

A. The Various Theories This Court Has Recognized For Proving And Defending Discrimination Claims Have, To A Large Extent After *Wards Cove v. Atonio*, Merged And Now Concentrate Upon An Employer's Production Of A Business Justification.

Over the years, this Court has adopted various theories under which plaintiffs can prove, and employers can defend, claims of Title VII discrimination. The Court's decision last term in *Wards Cove Packing Co., Inc. v. Atonio*, 109 S.Ct. 2115 (1989), however, harmonized these theories by making it clear that, no matter which approach is used, a plaintiff retains the burden of establishing a claim of discrimination throughout the course of the litigation, and an employer has the burden merely of producing a business justification for its challenged policy.

The first discrimination theory, disparate treatment, is concerned with those situations in which an employer intentionally "treats some people less favorably than others because of race, color, religion, sex, or national origin." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). To establish a *prima facie* case, the plaintiff must satisfy the four requirements established by this Court in *McDonnell Douglas Corp. v.*

Green, 411 U.S. 792, 802 (1973),[1] or otherwise produce evidence "adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act," *Teamsters*, 431 U.S. at 358 (1977).

Disparate impact, on the other hand, concerns specific "practices, procedures or tests," *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971), "that are facially neutral in their treatment of different groups, but that in fact fall more harshly on one group than another," *Teamsters*, 431 U.S. at 335 n.15. While proof of discriminatory motive is not required, *id.*, to establish a *prima facie* case under the impact theory, the plaintiff must identify a specific employment practice that is challenged and show that it has caused a significantly discriminatory impact. *Wards Cove*, 109 S.Ct. at 2125. Thus, although the two methods of establishing a case are different in their focus on an employer's intent, they are similar to the extent that they both require a substantial level of initial proof from the plaintiff.

In addition, it is now clear that the two theories are similar with regard to the employer's burden on rebuttal. Once the plaintiff makes an initial showing under the disparate impact theory, the employer must produce or articulate "evidence of a business justification for his employment practice." *Wards Cove*, 109 S.Ct. at 2126. This is essentially the same as the employer's long-established burden under the disparate treatment theory, which is not to *prove*, but rather to produce or "*articulate* some legitimate, nondiscriminatory reason" for a challenged action, *McDonnell Douglas*, 411 U.S. at 802 (emphasis added). *See Furnco Construction Corp. v. Waters*, 438

[1] *McDonnell Douglas* requires the plaintiff to show "(i) that he belongs to a [protected class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802.

U.S. 567, 577 (1978). Even where an employer defends a disparate treatment case by establishing a bona fide occupational qualification (BFOQ),[2] according to the Seventh Circuit below, it is essential that an employer produce a business reason for its behavior. 886 F.2d at 894 ("[BFOQ] concerns are in many ways quite similar to those a court should address in a business necessity defense analysis").[3] For an employer under each of these rebuttal theories, therefore, production of a business justification is key.

Most importantly, there is no doubt since *Wards Cove* that both theories require the plaintiff to carry the burden of persuasion throughout. Justice White, in the majority opinion in *Wards Cove*, explained:

> The burden of persuasion, however, remains with the disparate-impact plaintiff. . . . "[T]he ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." *Watson* [*v. Fort Worth Bank & Trust Co.*], 487 U.S., at —, 108 S.Ct. at 2790 (O'CONNOR, J.) (emphasis added). *This rule conforms with the usual method for allocating persuasion and production burdens in the federal courts, see Fed. Rule Evid. 301, and more specifically, it conforms to the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration.* See *Texas Dept. of*

[2] The BFOQ defense, found at 42 U.S.C. § 2000e-2(e), permits sex discrimination where it "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business. . . ."

[3] *See Chambers v. Omaha Girls Clubs, Inc.*, 834 F.2d 697, 704 (8th Cir. 1987) ("[T]he district court's finding of business necessity itself is persuasive as to the existence of a bfoq. This court has noted that the analysis of a bfoq 'is similar to and overlaps with the judicially created 'business necessity' test.'").

Community Affairs v. Burdine, 450 U.S. 248, 256-258 (1981).

109 S.Ct. 2126 (emphasis added). Indeed, in his dissenting opinion in *Wards Cove*, Justice Stevens (joined by Justices Brennan, Marshall and Blackmun) noted that the "majority's opinion blurs [the] distinction" between the disparate impact and the disparate treatment theories for purposes of an employer's burden of proof. *Id.* at 2130.[1]

It is clear, therefore, that the various theories of proof under Title VII involve, to a large degree, the same fundamental elements: all require a plaintiff to maintain the burden of persuasion throughout, and, significantly, require an employer merely to produce a legitimate business justification for its policy. As we now show, the various standards that courts and the EEOC have adopted for analyzing fetal protection policies fit well within this now-settled Title VII framework.

[1] In fact, as the Seventh Circuit below properly noted, these enumerated theories are not rigid—but are intended to be flexible depending upon the facts presented. 886 F.2d at 883. For example, this Court stated that the four *McDonnell Douglas* requirements are not an inflexible formula, but "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco*, 438 U.S. at 577. Indeed, in *Teamsters*, 431 U.S. 324, this Court called for a rule in analyzing different factual situations that is not inflexible. *See Wright v. Olin*, 697 F.2d 1172, 1186 n.21 (4th Cir. 1982) ("While the loose equation—overt discrimination/b.f.o.q. only defense—is . . . properly descriptive of a paradigmatic litigation pattern, it is not an accurate statement of any inherent constraints in Title VII doctrine").

B. Three Courts Of Appeals And The EEOC Have Advanced Standards For Analyzing Fetal Protection Policies That Contain Common Elements Of Proof Concentrating Upon The Employer's Business Justification.

In *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982), the Fourth Circuit held that employer fetal protection policies, such as the one at issue herein, are permissible. In doing so, the court used a modified disparate impact theory,[5] and adopted a standard requiring the employer to demonstrate that:

> [1] significant risks of harm to the unborn children of women workers from their exposure during pregnancy to toxic hazards in the workplace make necessary, for the safety of the unborn children, [2] that fertile women workers, though not men workers, be appropriately restricted from exposure to those hazards and [3] that its program of restriction is effective for the purpose.

697 F.2d at 1190 (footnote omitted). Even so, the Fourth Circuit permitted a plaintiff to rebut this showing with "proof that there are 'acceptable alternative policies or practices which would better accomplish the business purpose . . . [of protecting against the risk of harm], or accomplish it equally well with a lesser differential . . . impact [between women and men workers].'" *Id.* at 1191, *quoting Robinson v. Lorillard*, 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

Similarly, the Eleventh Circuit in *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984), discussed the firing of a pregnant hospital x-ray technician

[5] Although the court conceded that the disparate impact theory normally is applied only in cases in which an employer's policy is "facially neutral," such a dispute over which theory to use "would involve mere semantic quibbling having no relevance to the underlying principle that gave rise to this theory." 697 F.2d at 1186.

after unsuccessfully attempting to find her alternative work. In doing so, the Eleventh Circuit, like the Fourth, adopted a modified disparate impact standard, reasoning that the hospital's policy is facially neutral in the sense that it "equally protects the offspring of all employees." *Id.* at 1552. Again, in examining the employer's business reasons for its policy, the court used a standard it saw as "identical" to that announced by the Fourth Circuit in *Olin*:

> [T]he employer must show (1) that there is a substantial risk of harm to the fetus or potential offspring of women employees from the women's exposure, either during pregnancy or while fertile, to toxic hazards in the workplace and (2) that the hazard applies to fertile or pregnant women, but not to men.

726 F.2d at 1548 and n.8. As in *Olin*, "the employer's business necessity defense may be rebutted by proof that there are acceptable alternative policies that would better accomplish the purposes . . . with a less adverse impact on one sex." *Id.* at 1553.[6]

Endorsing the burden of proof model established in *Olin* and *Hayes*, the EEOC in 1988 issued its *Policy Statement on Reproductive and Fetal Hazards Under*

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[6] *Hayes* declined to adopt *Olin*'s description of the employer's showing as "business necessity," but the substantive requirements of what an employer has to show are nonetheless "identical." 726 F.2d at 1548 n.8. As properly noted by the Seventh Circuit below:

> Although *Olin* and *Hayes* represent somewhat different analyses, both cases, in essence, determine that a business necessity defense in a fetal protection policy case requires (1) a demonstration of the existence of a substantial health risk to the unborn child, and (2) establishment that transmission of the hazard to the unborn child occurs only through women. Both cases also allow the employee to present evidence of less discriminatory alternatives equally capable of preventing the health hazard to the unborn.

886 F.2d at 885.

Title VII. The Policy stated that the issues in a fetal protection case are:

> (1) whether there exists a substantial risk of harm to employees' offspring through the exposure of employees to a reproductive or fetal hazard in the workplace; (2) whether the harm to employees' offspring takes place through the exposure of employees of one sex but not employees of the opposite sex; and (3) whether the employer's policy effectively eliminates the risk of fetal or reproductive harm. Even if these elements are proved, the policy will not withstand scrutiny if it is shown that there exists a reasonable alternative policy that will protect employees' offspring from fetal or reproductive harm and that has a less discriminatory impact on employees of the restricted sex.

Policy Statement, reprinted in Fair Empl. Prac. Man. (BNA) at 405:6615 (hereinafter cited as "1988 Policy Statement") (footnotes omitted).[7] Even in its 1990 *Policy Guidance on United Auto Workers v. Johnson Controls, Inc.*, the EEOC noted that the "pertinent questions" under either the "BFOQ or the 'business necessity' analysis" are the same. *Id.* at 9, *reprinted in* Pet. App. 127a-144a.[8]

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[7] The Statement asserted that fetal protection "cases do not fit neatly into the traditional Title VII analytical framework and, therefore, must be regarded as a class unto themselves." Even so, the agency viewed "business necessity" as the appropriate defense.

The EEOC explained that "an employer's reproductive or fetal protection policy must be neutrally designed to protect all employees' offspring from hazards existing in the workplace. Where substantial evidence exists that the risk of harm to employees' offspring takes place only through the exposure of one sex to a hazard existing in the workplace, an employer may exclude from the workplace employees of that sex, but only to the extent necessary to protect employees' offspring from reproductive or fetal hazards." *Policy Statement*, Fair Empl. Prac. Man. at 405:6615-6616.

[8] Under the new EEOC standard, an employer must establish a BFOQ, and not mere business necessity. Nonetheless, the factors

Still another court of appeals—the Seventh Circuit below—agreed "that the components of the business necessity defense the courts of appeals and the EEOC have utilized in fetal protection cases balance the interests of the employer, the employee and the unborn child in a manner consistent with Title VII." 886 F.2d at 886. The Seventh Circuit stated:

> The requirement of a [1] substantial health risk to the unborn child effectively distinguishes between the legitimate risk of harm to health and safety which Title VII permits employers to consider and the "[m]yths or purely habitual assumptions" . . . that employers sometimes attempt to impermissibly utilize to support the exclusion of women from employment opportunities. Likewise, the requirement that the [2] risk of harm to offspring be substantially confined to female employees means that a fetal protection policy applying only to women recognizes the basic physical fact of human reproduction, that only women are capable of bearing children. Finally, the employee's option of presenting [3] less discriminatory alternatives to a fetal protection policy assures that these policies are only as restrictive as necessary to prevent the serious risk of harm to the unborn child.

Id. at 886-87 (footnote omitted). Indeed, the inquiry is similar under the Seventh Circuit's BFOQ standard in the sense that the focus is upon an employer's business justification for its exclusion. As the Seventh Circuit stated, the "concerns" under the BFOQ defense analysis "are in many ways quite similar to those a court should address in a business necessity defense analysis." 886 F.2d at 894. Even where the BFOQ focus is on what is "reasonably necessary' to an employer's "normal operation" of its "particular business," the inquiry is the same —an employer's concern for the safety of its workers and of third parties.

Accordingly, it is clear that all fetal protection policy standards that have been adopted by the courts and the EEOC contain common elements. From a policy viewpoint, it certainly makes no sense to subject a fetus or other third party to the vagaries of various standards depending upon the jurisdiction. To the contrary—as we now show, this Court should annunciate a uniform standard incorporating these common elements, but one that does not read safety concerns out of Title VII.

II. TITLE VII DOES NOT LIMIT LEGITIMATE BUSINESS JUSTIFICATIONS SOLELY TO FACTORS AFFECTING AN EMPLOYEE'S ABILITY TO "PERFORM THE JOB"; RATHER, IT PERMITS EMPLOYERS TO CONSIDER THE LEGITIMATE SAFETY INTERESTS OF EMPLOYEES AND THIRD PARTIES.

The UAW and its amici argue that an employer's fetal protection policy constitutes intentional discrimination against women and, as such, can be defended only under the BFOQ model.[9] They argue, however, that an em-

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are mostly the same under both theories. Under the new standard, in addition to showing "substantial risk" (here conceded by the UAW) and transmission of the risk through women only (fully credited by the Seventh Circuit below), an employer must show that its policy "minimizes the risk while excluding the narrowest possible group." *Policy Guidance on United Auto Workers v. Johnson Controls, Inc.*, Equal Employment Opportunity Commission (January 24, 1990), at 9. The plaintiff may still show that there are reasonable alternatives which are less onerous to women," which, as shown fully below, the UAW failed to do in the present case.

The primary difference between the old and new standards, according to the EEOC and the Government in their amicus brief, is that the employer maintains the burden of establishing a BFOQ, while the plaintiff keeps the burden of persuasion in a business necessity case throughout. Brief for the United States and the Equal Employment Opportunity Commission Supporting Petitioners at 15. As we show below, however, an employer ought to be able to meet its burden with identical criteria regardless of the theory.

[9] EEAC and NAM adopt the contrary view that because Johnson Controls' fetal protection policy equally protects the offspring of

ployer can never prevail under this BFOQ theory, because it cannot be shown that such a policy is related to a worker's ability to perform his or her job "efficiently and proficiently." *See* Petitioner's Brief at 29-34 (here-

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all employees, and thus is not discriminatory on its face, that it is, accordingly, supportable under the traditional disparate impact/business necessity model.

First, this case clearly can be viewed under the disparate impact model because the same two elements are present herein that were present in *Hayes*: namely that Johnson Controls has shown 1) that its policy "is justified on a scientific basis" and 2) that "it is not necessary to protect the offspring of male employees" in the same manner. 726 F.2d at 1552. Upon this proof, according to *Hayes*, "the employer has shown that its policy is neutral, in the sense that it *equally protects the offspring of all employees*." *Id.* (emphasis added). Indeed, this analytical view has been adopted by all appellate courts that have considered the issue. *See Johnson Controls*, 886 F.2d at 886 ("We agree with the Fourth Circuit, the Eleventh Circuit and the EEOC in their conclusion that a business necessity defense may be utilized in a fetal protection policy case.").

Second, it is clear that Johnson Controls has in fact established a business necessity defense since it has "produce[d] evidence of a business justification for [its] employment practice." 886 F.2d at 887, *citing Wards Cove*, 108 S. Ct. at 2126.

Third, the UAW has failed to present facts sufficient to persuade a court that Johnson Controls' business necessity defense cannot be factually supported—a burden which the UAW maintains at all times. *Wards Cove*, 109 S.Ct. at 2126. Specifically, as recognized by the Seventh Circuit below, the UAW failed to carry its burden of demonstrating that the risk of transmitting lead exposure to unborn children occurs through men as well as women. 886 F.2d at 890.

Just as importantly, the UAW failed to present adequate, but less discriminatory, alternatives to Johnson Controls' fetal protection policy. Indeed, the UAW failed in two ways: 1) it did not raise the issue in its brief to the Seventh Circuit, in violation of Rule 28(a)(4) of the Federal Rules of Appellate Procedure; and 2) even if it *had* raised the issue, the UAW did not meet its difficult burden under *Wards Cove* to present specific economically feasible alternatives, that are equally effective, and which equally further Johnson Controls' legitimate interests. 886 F.2d at 892, citing *Wards Cove* at 2126-2127.

inafter cited as "UAW Brief"). According to the UAW, an employer may consider only "production"—not the safety of its employees, third parties or the general public. UAW Brief at 29 n.27, 33; Brief of the National Organization of Women at 24.[10]

As fully explained elsewhere in this brief, EEAC and NAM submit that there is no valid basis in Title VII for such outcome-determinative constructions of the various discrimination theories. But regardless of what this standard is called, this Court should in no event sanction a requirement that considers "production" as the only legitimate business justification for a policy that affects employment opportunities. Rather, as properly recognized by the Seventh Circuit below, and as discussed more fully in the next section, Title VII permits an employer to consider legitimate safety concerns. Indeed, this Court has repeatedly recognized safety as a key inquiry—even under the BFOQ theory.

In *Dothard v. Rawlinson*, 433 U.S. 321 (1977), for example, this Court recognized as legitimate a prison's concern for the "*safe* and efficient job performance" of a woman applying for a job as correctional officer. *Id.* at 331 n.14 (emphasis added). More importantly, this Court noted that where, as here, "[m]ore is at stake" than the employee's own safety—*i.e.* the safety of third parties—an employer properly may consider more than whether the woman can do the job. *Id.* at 335-36. Indeed, this Court expressed its concern for third parties when it explained:

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[10] Indeed, two of the dissenters in *Johnson Controls* (Judges Easterbrook and Flaum) argue that the BFOQ standard applies herein. However, under their BFOQ analysis, in applying the BFOQ test to women, Johnson would be required to show that its policy is based on evidence that fertile women differ in their ability to perform the duties of the job, a test that could not involve considerations of safe job performance. We disagree with the dissenters by advocating more "flexibility," *see Furnco*, 438 U.S. at 577, for employers to establish a business justification.

> *The likelihood that inmates would assault a woman because she was a woman would pose a real threat* not only to the victim of the assault but also *to the basic control of the penitentiary and protection of its inmates and the other security personnel.* The employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility.

Id. at 336 (emphasis added).

Similarly, in *New York Transit Authority v. Beazer*, 440 U.S. 568 (1979), this Court recognized that the City of New York Transit Authority's rule denying employment to methadone users "significantly serve[s]" the "legitimate employment goals of *safety* and efficiency." *Id.* at 587 n. 31 (emphasis added). According to this Court, the rule "bears a 'manifest relationship to the employment in question,'" both for safety-sensitive and non-safety-sensitive jobs. *Id.*, citing *Griggs*, 401 U.S. at 432.

Indeed, in *Western Air Lines v. Criswell*, 472 U.S. 400, 419 (1985), this Court addressed the BFOQ defense under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* Significantly, while *Criswell* struck down the company's policy that required flight engineers to retire upon reaching age 60, it upheld a similar policy for pilots. In noting the interests of third parties under the BFOQ standard, this Court stated that an examination of an employer's job qualifications must "further the overriding interest in public safety," and indeed acknowledged that "Congress did not ignore the *public* interest in safety" when it "adopt[ed] that standard." *Id.* at 413 and 419 (emphasis added). *See also Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251 1263 (6th Cir. 1981); *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361, 371-72 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981); *Worthy v. U.S. Steel Corp.*, 616 F.2d 698 (3d Cir. 1980); *Friend v. Leidinger*, 588 F.2d 61, 65 (4th Cir. 1978); *Spurlock v. United Airlines, Inc.*, 475 F.2d 216, 219 (10th Cir. 1972).

Thus, while the UAW argues that safety concerns are relevant only if related to "the individual's abilities to perform the assigned tasks," UAW Brief at 30, this Court said just the opposite in *Dothard*, *Beazer* and *Criswell*, and the courts of appeals have followed suit. Clearly, therefore, a proper interpretation of Title VII allows employers to consider safety concerns—even those of third parties, such as the fetuses herein. Accordingly, this Court should in no event adopt an analysis of the BFOQ defense that would not allow an employer to consider safety as a legitimate business consideration. As shown below, and further explained in Johnson Controls' brief, the appropriate issue is, in part, the safety of third parties.

III. UNDER A PROPER INTERPRETATION OF TITLE VII, AN EMPLOYER MAY DEFEND A FETAL PROTECTION POLICY BY INTRODUCING EVIDENCE THAT THERE EXISTS A SUBSTANTIAL RISK OF HARM, THAT THE RISK OF TRANSMITTING SUCH HARM IS SUBSTANTIALLY CONFINED TO EMPLOYEES OF ONE SEX, AND THAT ITS POLICY IS REASONABLY NECESSARY TO THE NORMAL, SAFE OPERATION OF ITS BUSINESS.

EEAC and NAM urge this Court, in affirming the decision of the Seventh Circuit below, to articulate a standard incorporating the common elements contained in the decisions discussed above. Specifically, the Court should make clear that Title VII permits an employer to defend its fetal protection policy by introducing evidence of the following: 1) that there exists a substantial risk of harm; 2) that the risk of transmitting such harm is substantially confined to employees of one sex; and 3) that its policy is reasonably necessary to the normal operation of its business—with due consideration of the safety of third parties.

This standard is explained more fully below.

A. Producing Evidence Regarding A Substantial Health Risk To The Unborn Child Through Workplace Exposure To Toxins.

As the first element of its business justification, an employer would ordinarily have to produce evidence regarding a substantial fetal health risk through workplace exposure. Here, that showing has been made, since, as properly recognized by the Seventh Circuit below, "[*b*]*oth* the UAW and Johnson Controls agree on appeal that the significant evidence of risks to the health of the fetus contained in the record establishes a *substantial* health risk to the unborn child." 886 F.2d at 888 (emphasis in original).[11]

In future cases, should a plaintiff not concede the existence of a risk, an employer ought to be able to meet its justification burden by producing scientific evidence that is supported by qualified expert opinion. *See Hayes*, 726 F.2d at 1548. In cases involving lead exposure, such a risk is clear. Indeed, even though it noted the UAW's concession in this regard, the Seventh Circuit went on to find that "overwhelming medical and scientific research data demonstrating a substantial risk to the unborn child from lead exposure. . . approaches a 'general consensus within the qualified scientific community,' and certainly 'suffices to show that within that community there is [a]

[11] The UAW admitted in its brief to the Seventh Circuit at page 33 that "it is clear that . . . substantial risk of harm to the fetus . . . has been established." Likewise, Johnson Controls stated below that "[t]he evidence in the record on [substantial risk of harm to the fetus] is overwhelming." Johnson Controls Brief at 22. As the Seventh Circuit properly noted: "[i]n light of the parties' agreement on the question of substantial risk of harm to the unborn child, this issue is not before this court on appeal." 886 F.2d at 888. At this late stage, the UAW and its amici seek to recharacterize this risk as speculative. That recharacterization should not be allowed.

considerable body of opinion that significant risk exists.' " 886 F.2d at 888, *citing Olin*, 697 F.2d at 1191.

B. Reasonably Relying On Available Evidence That The Risk Of Transmission Of The Hazard Is Substantially Confined To Employees Of One Sex.

Under a proper reading of Title VII doctrine, the employer must also establish that the risk of transmitting the hazard is substantially confined to employees of one sex. Again, an employer should not have to *prove the existence* of a general consensus of opinion, but rather should only have to produce "scientific evidence" to support its position. *See Hayes*, 726 F.2d at 1548-54. Significantly, the employer should be able to carry its burden by showing that, based on "reasonable necessity," it is relying "on the best available scientific data." *Wright*, 697 F.2d at 1190 n.27. Such a standard fully comports even with the BFOQ standard and this Court's safety cases discussed in Section II above. *See Criswell*, 472 U.S. at 419 (employer need not be "certain[]" of the safety risk, just have a "credible basis in the record.").

The evidence presented by Johnson Controls herein certainly met this standard. Accordingly, the Seventh Circuit concluded:

> The evidence presented concerning the lingering effects of lead in a woman's body, combined with the magnitude of medical difficulties in detecting and diagnosing early pregnancy, lead us to agree with Johnson Controls that there exists a reasonable basis in fact to conclude that an extension of this policy to all fertile women is proper and reasonably necessary to further the industrial safety concern of preventing the unborn child's exposure to lead.

886 F.2d at 898-99. This makes sense: lead is deposited in the mother's placenta and bones, and is passed to the fetus directly through blood flow or decalcification during pregnancy. *See* 886 F.2d at 879, 882.

In contrast, a male's exposure to lead can affect his offspring only if it causes genetic damage. All of the company's experts testified that male exposure below the OSHA standard (50 μg/dl) did not pose substantial risk to unborn children. Indeed, OSHA's own standards were inconclusive with regard to male exposure. *Id.* Moreover, as fully explained in the Respondent's Brief, the UAW offered rodent studies, which were not credited by the Seventh Circuit below, and its own experts in fact conceded that "male-mediated" risk is, at best, speculative.

This Court has always permitted a "gender classification [that] is not invidious, but rather realistically reflects that fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981). Where the evidence shows that lead is passed through the placenta and bone decalcification during pregnancy—a phenomenon not experienced by male workers—this Court should not hesitate to defer to an employer's "reasonably necessary" exclusion,[12] and should indeed adopt such a standard for future cases.

C. Showing That Its Policy Is Reasonably Necessary To The Normal Operation Of Its Business, With Due Concern for Industrial Safety.

An additional element of the employer's business justification will ordinarily be to produce evidence that its

[12] Johnson Controls adopted its fetal protection policy in response to a very real threat: at least six women had become pregnant while having excessive levels of lead in their blood. 886 F.2d at 876-77. This threat clearly is not one of the "[m]yths or purely habitually assumptions" about the "characteristics of males or females." *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 707 (1978), and, according to the Seventh Circuit below, "the convincing scientific evidence of this risk and the very serious consequences of this danger combine to make this health risk quite different from the concerns in *Muller v. Oregon*, 208 U.S. 412, 421-22 (1908), which we would currently characterize as stereotypical rather than real." 886 F.2d at 898.

fetal protection policy is "reasonably necessary to the normal operation" of its business—an element that includes the consideration of legitimate safety factors. This may be viewed as very similar to a BFOQ showing,[13] which permits an employer to consider the consequences of its inaction on its workers, third parties and society in general. As shown above, this Court has approved employers' consideration of the safety of third parties in previous decisions, and it should similarly recognize here that Title VII permits such consideration as part of the "normal operation" of a particular business. As the Seventh Circuit properly noted:

> At a broad level, Johnson's business, insofar as relevant to this case, is the manufacture of batteries. Johnson's business is "unique" because it requires the use of lead, an extremely toxic substance that has been scientifically established to pose very serious dangers to young children and, in particular, to the offspring of female employees. *In order to respond to the problems accompanying its unique battery manufacturing operation, Johnson Controls has properly made it part of its business to attempt to manufacture batteries in as safe a manner as possible. This safety interest is every bit as critical to the mission of Johnson's battery manufacturing business as rehabilitation of prisoners is to the mission of the prison facility at issue in [other cases].* Furthermore, like the prison in [other cases], Johnson has found it necessary to "innovate" to achieve its essential goal of manufacturing batteries safely through the adoption of a fetal protection policy that would address the health/safety problems related to its female employees significantly more effectively than the alternative policies it had considered.

[13] As shown in Johnson Controls' brief, the BFOQ defense is properly applied to fetal protection policies, and has consistently been interpreted to allow employers to consider third party safety.

886 F.2d at 896. It is clear, therefore, that the "essence" of Johnson Controls' "normal operation" as a battery manufacturer includes consideration of the health of its workers and their unborn.

Similarly, as properly found by the court below, Johnson Controls' fetal protection policy is "directly related" to its concern with industrial safety. *Id.* According to the Seventh Circuit:

> Certainly a policy is directly related to industrial safety when it protects unborn children from a substantial risk of devastating permanent impairment or loss of intellectual ability or injury to vital organs resulting from exposure to a toxic industrial chemical.

Id.

Indeed, "[m]ore is at stake," *Dothard*, 433 U.S. at 335, in a fetal protection case than the risk to mother and fetus. Companies face the very real possibility of tort lawsuits where a fetus is born deformed. As explained by dissenting Judge Posner, 886 F.2d at 904:

> The parties agree that there is a solid medical basis for concern with fetal injury from airborne lead in the concentration found in battery plants, and this concern could in turn cause the employer to worry about being sued by injured children of his employees. Such a suit would not be preempted by workers' compensation law, because the plaintiff would not be the worker. *The employer would therefore be exposed to full common law damages, punitive as well as compensatory. The mother's own negligence—for if she had been clearly warned of the hazard, but voluntarily became pregnant anyway and continued to work making batteries, she would be acting negligently with regard to the fetus—would not be imputed to the child and therefore would not reduce the employer's liability. . . .*[14] *It would merely make*

[14] The Seventh Circuit cited the following cases for this proposition: *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 200 n.14, 342 N.W. 2d 37, 53 n.14 (Wis. 1984); *In re Estate of Infant Fontaine*, 128 N.H. 695, 519 A.2d 227, 230 (N.H. 1986); *Fabianke v. Weaver*, 527 So. 2d 1253, 1258 (Ala. 1988).

> *the mother a joint tortfeasor with the employer. Moreover, she might not be negligent; the pregnancy might be involuntary, and lead can injure the fetus before the mother knows she is pregnant.*

(Emphasis added).

From the perspective of the amici EEAC and NAM, these concerns about tort liability are of major concern. Indeed, the magnitude of exposure is potentially astronomical. As also noted by Judge Posner:

> *[I]t is difficult to estimate Johnson Controls' exposure to tort liability, but it would be premature, in this age of mass-tort suits (which for example drove the asbestos industry into bankruptcy), to dismiss it as trivial. The possibility of tort suits against battery manufacturers for lead injury to the child of a female employee is not merely a theoretical one. There has already been one reported case; the plaintiff got to a jury, but lost.* See *Security National Bank v. Chloride, Inc.*, 602 F. Supp. 294 (D.Kan. 1985). *We should not dismiss the concern over tort liability as a narrow, selfish "bottom line" concern irrelevant to the purposes of Title VII.* The potential cost of tort liability to Johnson Controls is an approximation of the potential cost to the children who have suffered prenatal injury from the airborne lead absorbed into their mothers' bloodstreams. That is a social cost that Title VII does not require a company to ignore. *At some point it may become large enough to affect the company's normal method of operation* and supply the ground for a bona fide occupational qualification of infertility.

Id. at 905 (emphasis added).

If fetal protection policies are analyzed under the UAW's version of a BFOQ standard, many companies will have to abandon their programs or go out of business. Clearly, companies will not be able to defend their

protective plans under the UAW's proffered BFOQ standard, because they will not be able to prove that the women excluded cannot perform the physical tasks of their jobs.

Besides risks to the fetus and the employer, there are also risks to society from fetal lead exposure. Specifically, as noted by the Seventh Circuit majority, there would have to be established "government financed programs to train or maintain a handicapped child in non-institutional or institutional environments and to provide the child with the training necessary to overcome the mental and physical harm attributable to lead exposure." 886 F.2d at 897-98. Indeed, from a societal point of view, it makes no sense to shut down completely a company's production of batteries if production will only be moved overseas.

As we show more fully in the next section, an employer's requirement to establish that its policy is "reasonably necessary" to its "normal operation" must not be excessively burdensome, but rather the burden must remain, for the most part, with the plaintiff. Again, the standard must take into consideration the nature of an employer's business, as well as its concern for the safety of its workers and third parties.

IV. THE BURDEN OF PERSUASION REMAINS ON THE PLAINTIFF AT ALL TIMES TO CREATE A RECORD, TO ESTABLISH A PRIMA FACIE CASE, TO REBUT AN EMPLOYER'S SHOWING, AND TO SHOW A REASONABLE ALTERNATIVE.

Under both the disparate treatment and the disparate impact models, the plaintiff maintains the burden of persuasion at all times. *See Wards Cove*, 109 S.Ct. at 2126; *Burdine*, 450 U.S. at 256-258. Although the EEOC and the Government argue that the employer's rebuttal burden should be more rigorous under the BFOQ standard, we submit that this burden is met where the employer makes the showing discussed in Section III. Again, this Court should not construe Title VII as making the em-

ployer's "reasonably necessary" showing overly burdensome to the point where safety is read out of the Act. Rather, it is sufficient that an employer produce evidence of legitimate concerns for the safety of its employees and/or third parties.

Apart from this rebuttal showing, we view it as essential that this Court maintain the requirement that a Title VII plaintiff meet specific burdens. First, as a general matter, a plaintiff must create a record upon which a court can assess the legal and factual issues. 886 F.2d at 888. Here, for example, the Seventh Circuit found that the UAW failed to establish a record regarding the lack of fetal risk.

Second, the plaintiff must establish a *prima facie* case and rebut the employer's articulation of its defense. This comports with the general rules of proving and defending discrimination cases discussed in Section I of this brief.

Third, the plaintiff should have the burden of establishing adequate, but less discriminatory alternatives to the company's fetal protection policy. Here, of course, the UAW neglected to raise the issue of alternatives in its brief to the Seventh Circuit, and thus lost its right pursuant to Rule 28(a)(4) of the Federal Rules of Appellate Procedure. 886 F.2d at 891. But even assuming that the UAW had properly briefed the issue, this Court should endorse the rigorous standard adopted by the Seventh Circuit below, which in turn is drawn from this Court's decision in *Wards Cove*. As explained by the court below:

> . . . *Wards Cove* makes clear (1) that the UAW bears the burden of presenting specific economically and technologically feasible alternatives to Johnson Controls' fetal protection policy; (2) that if the UAW presents such alternatives, the UAW also bears the burden of demonstrating that its proposed alternative policy is "*equally* effective [as Johnson Controls' fetal protection policy] in achieving [Johnson's] legitimate employment goals," *Wards Cove*,

> 109 S. Ct. at 2127 (emphasis added); and (3) that *this inquiry is to be undertaken with the recognition that* "'[f]*actors such as the cost or other burdens of proposed alternative selection devices are relevant* in determining whether they would be equally as effective as the challenged practices in serving the employer's legitimate business goals,'" Id. at 2127 (quoting *Watson v. Fort Worth Bank & Trust*, —— U.S. ——, 108 S.Ct. 2777, 2790 (1988) (O'Connor, J.)) . . . .

886 F.2d at 892 (emphasis added).

Against this background, it should be emphasized that courts are "generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978). "[C]onsequently, the judiciary should proceed with care before mandating that an employer must adopt [an alternative employment practice] in response to a Title VII suit." *Wards Cove*, 109 S.Ct. at 2127.

It is the experience of the amici, EEAC and NAM, that employers do not adopt fetal protection policies "incautiously" or with any malice to discriminate against women, and they certainly do not do so for "minor gains" in fetal health. To the contrary, employers are naturally inclined to hesitate before adopting such a policy for a number of reasons. First, of course, is the reason that exclusion of a substantial section of the workforce leads to a smaller pool of qualified applicants and workers—a problem that exists in the present workforce, and that will become acute in the 1990s and beyond as the number of qualified workers decreases. W. Johnston and A. Packer, *Workforce 2000: Work and Workers for the Twenty-First Century*, Hudson Institute (1987); R. E. Ketscher, *Outlook 2000: Projections Summary and Emerging Issues*, Monthly Labor Review (November 1989). In fact, employers that adopt fetal protection policies run the risk of losing *current* employees who would otherwise be transferred to safer jobs within the plant.

Here, of course, there is no evidence that Johnson Controls adopted its policy in order to exclude women simply because they are women, but rather did so out of a legitimate concern for safety.

Additionally, adoption of a fetal protection policy undoubtedly complicates the administration of the workforce since medical authorizations have to be secured and records have to be maintained. In fact, as indicated by the facts of the instant case, employers face the costs and burdens of defending sex discrimination suits—ironically for taking a far-sighted approach to the elimination of a fetal health problem.

Accordingly, where the lives and health of the unborn are at stake, it makes sense for the courts to defer to an employer's reasonable decision and to appreciate the fundamental importance of safety. *See Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976).

CONCLUSION

For the foregoing reasons, the amici curiae respectfully submit that the Seventh Circuit's decision should be affirmed.

Respectfully submitted,

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